Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571, 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF 167 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AND 44 U.S. SENATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

HEATHER C. SAWYER
House Committee on the Judiciary
Minority Counsel to Ranking Members John Conyers, Jr. and Jerrold Nadler
B-336 Rayburn Bldg.
Washington, DC 20515
(202) 225-6906

JOSEPH F. TRINGALI
Counsel of Record
JOSHUA C. POLSTER
ELISA Y. LEE
AIDAN T. GRANO
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
jtringali@stblaw.com

Counsel for Amici Curiae

258065

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

A complete list of the 167 Members of the House of Representatives and 44 U.S. Senators participating as *amici* is provided in an appendix to this brief. Among them are:

NANCY PELOSI
House Democratic Leader

HARRY REID
Senate Democratic Leader

REP. JERROLD NADLER
SEN. DIANNE FEINSTEIN
Lead Sponsors, Respect for Marriage Act

STENY H. HOYER
House Democratic Whip

RICHARD J. DURBIN
Senate Assistant Democratic Leader

JAMES E. CLYBURN
House Assistant Democratic Leader

CHARLES E. SCHUMER
Vice Chair, Senate Democratic Conference

PATTY MURRAY
Secretary, Senate Democratic Conference

JOHN CONYERS, JR.
Ranking Member, House Committee on the Judiciary

PATRICK LEAHY
Ranking Member, Senate Committee on the Judiciary

JARED POLIS, DAVID N. CICILLINE, SEAN PATRICK MALONEY, MARK POCAN, KYRSTEN SINEMA, and MARK TAKANO
House LGBT Equality Caucus Co-Chairs

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 5

ARGUMENT 4

I. The Constitution Applies with Equal Force to State Regulation of Marriage 4

II. State Marriage Bans Should Be Subject to Heightened Scrutiny 7

III. No Matter the Standard, State Marriage Bans Violate the Equal Protection Clause and Impair Federal Interests 12

A. State Marriage Bans Deny Equal Protection 13

B. Like DOMA, State Marriage Bans Have a Profound Federal Impact on Same-Sex Couples 14

C. State Marriage Bans Undermine Federal Programs 15

Table of Contents

Page

1. Social Security 16

2. Military and Veterans' Benefits.....19

3. Domestic Support Obligations 24

4. Federal Employee Protections.....25

IV. States' Refusals to Respect Lawful Marriages Place Our Constituents at Risk. 27

A. Like DOMA, States that Refuse to Recognize Valid Marriages Deny Equal Protection 27

B. States that Refuse to Recognize Valid Marriages Deprive Many of Our Constituents of Important Rights Essential to Family Stability.....30

C. States that Refuse to Recognize Valid Marriages Divest Many of Our Constituents of the "Dignity and Status of Immense Import" of Marriage.....35

CONCLUSION 38

Appendix.....1a

TABLE OF CITED AUTHORITIES

Page

Cases

Arizona v. Gant,
556 U.S. 332 (2009). 5

Baskin v. Bogan,
766 F.3d 648 (7th Cir. 2014). 7, 13, 15

Borman v. Pyles-Borman,
No. 2014CV36, 2014 WL 4251133
(Tenn. Cir. Ct. Aug. 5, 2014) 25

Bostick v. CBOCS, Inc.,
No. 8:13-cv-1319-T-30TGW, 2014 WL 3809169
(M.D. Fla. Aug. 1, 2014). 10

Brown v. Bd. of Educ.,
347 U.S. 483 (1954). 5

Campaign for S. Equal. v. Bryant,
No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570
(S.D. Miss. Nov. 25, 2014) 34

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985). 6, 8

Crawford v. Washington,
541 U.S. 36 (2004). 5

Dandridge v. Williams,
397 U.S. 471 (1970). 14

Cited Authorities

Page

De Sylva v. Ballentine,
351 U.S. 570 (1956) 15

DeBoer v. Snyder,
772 F.3d 388 (6th Cir. 2014) 9

Frontiero v. Richardson,
411 U.S. 677 (1973) 8

Graham v. Richardson,
403 U.S. 365 (1971) 29

Grutter v. Bollinger,
539 U.S. 306 (2003) 5

Henry v. Himes,
14 F. Supp. 3d 1036 (S.D. Ohio 2014), *rev'd sub nom. DeBoer*, 772 F.3d 388 (6th Cir. 2014) 28, 31, 37

Howe v. Haslam,
No. N2013-01790-COA-R3-CV, 2014 WL 5698877 (Tenn. Ct. App. Nov. 4, 2014) 10

In re Golinski,
587 F.3d 901 (9th Cir. 2009) 25

In re Miller's Estate,
214 N.W. 428 (Mich. 1927) 28, 37

In re Neagle,
135 U.S. 1 (1890) 26

Cited Authorities

Page

Inskeep v. W. Reserve Transit Auth.,
No. 12 MA 72, 2013 WL 979054 (Ohio Ct. App. Mar. 8, 2013) 10

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 5

Keith v. Pack,
187 S.W.2d 618 (Tenn. 1945) 28, 37

Kirchberg v. Feenstra,
450 U.S. 455 (1981) 5

Kitchen v. Herbert,
755 F.3d 1193 (10th Cir. 2014) 30

Kolender v. Lawson,
461 U.S. 352 (1983) 5

Langbehn v.
Pub. Health Trust of Miami-Dade Cnty.,
661 F. Supp. 2d 1326 (S.D. Fla. 2009) 33

Latta v. Otter,
771 F.3d 456 (9th Cir. 2014) 13

Lawrence v. Texas,
539 U.S. 558 (2003) ..... *passim*

Loving v. Virginia,
388 U.S. 1 (1967) 5

Cited Authorities

Page

Mathews v. De Castro,
429 U.S. 181 (1976) 16

Mazzolini v. Mazzolini,
155 N.E.2d 206 (Ohio 1958) 28, 37

Obergefell v. Kasich,
No. 1:13-cv-501, 2013 WL 38142627 (S.D. Ohio July 22, 2013) 32

Obergefell v. Wymyslo,
962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom. DeBoer*, 772 F.3d 388 (6th Cir. 2014) ... 13, 28, 32, 37

Perry v. Brown,
671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) 29-30

Plessy v. Ferguson,
163 U.S. 537 (1896) 3, 13

Romer v. Evans,
517 U.S. 620 (1996) ..... *passim*

Saenz v. Roe,
526 U.S. 489 (1999) 29

SmithKline Beecham Corp. v. Abbott Labs.,
740 F.3d 471 (9th Cir. 2014) 7

Cited Authorities

Page

Sunday Lake Iron Co. v. Wakefield Twp.,
247 U.S. 350 (1918) 5

Tanco v. Haslam,
7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom. DeBoer*, 772 F.3d 388 (6th Cir. 2014) 35, 36

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 6

United States v. Morrison,
529 U.S. 598 (2000) 4

United States v. Virginia,
518 U.S. 515 (1996) 5

United States v. Windsor,
133 S. Ct. 2675 (2013) ..... *passim*

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) 7, 29

Zablocki v. Redhail,
434 U.S. 374 (1978) 27, 33

Constitutional Provisions

U.S. Const. art. VI, cl. 3 25

Cited Authorities

Page

Statutes & Regulations

5 U.S.C. §§ 8101 *et seq.* 25

5 U.S.C. § 8901 25

5 U.S.C. § 8905 25

5 U.S.C. § 9001 25

5 U.S.C. § 9002 21

10 U.S.C. § 1072 21

10 U.S.C. § 1076 21

10 U.S.C. § 1077 21

10 U.S.C. § 1097a 20

10 U.S.C. § 1448 20

10 U.S.C. § 1450 24

11 U.S.C. § 101 24

11 U.S.C. § 507 24

11 U.S.C. § 523 26

Cited Authorities

Page

18 U.S.C. § 115 26

28 U.S.C. § 1738C 29

32 U.S.C. § 714 20

37 U.S.C. § 402a 21

37 U.S.C. § 403 21

37 U.S.C. § 403b 21

37 U.S.C. § 427 21

38 U.S.C. § 103 22

38 U.S.C. § 1115 20

38 U.S.C. § 1135 20

38 U.S.C. § 1311 20

38 U.S.C. § 1541 20

38 U.S.C. § 1781 21

38 U.S.C. § 3311 20

38 U.S.C. § 3501 20

Cited Authorities

Page

38 U.S.C. § 3710 20

38 U.S.C. § 5121 20

38 U.S.C. § 5121A 20

42 U.S.C. § 402 ..... 16, 17

42 U.S.C. § 416 17

50 App. U.S.C. § 538 21

42 C.F.R. § 482.13 34

42 C.F.R. § 485.635 34

Ky. Rev. Stat. Ann. § 311.631 34

Ohio Rev. Code Ann. § 2133.08 34

Tenn. Code Ann. § 7-64-201 36

Tenn. Code Ann. § 31-2-104 35

Tenn. Code Ann. § 66-1-109 36

Tenn. Code Ann. § 68-11-1806 34

Other Authorities

127 Cong. Rec. 21,378 (1981) 19

Cited Authorities

Page

About Us, TRICARE, http://tinyurl.com/obergefell12-1 21

Admin. on Aging, U.S. Dep't of Health & Human Servs., *A Profile of Older Americans: 2013*, http://tinyurl.com/obergefell08 16

Associated Press, *LGBT Baby Boomers Face Tough Retirement Hurdles*, Dec. 2, 2014 19

Blake Boldt, *Woman Denied Visitation of Partner at Local Hospital*, Out & About Nashville, Dec. 19, 2011, http://tinyurl.com/obergefell19 34

Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as *Amici Curiae* in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, *Windsor v. United States*, 133 S. Ct. 2675 (2013) (No. 12-307) 7

Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of The U.S. House of Representatives, *Windsor v. United States*, 133 S. Ct. 2675 (2013) (No. 12-307) 11

Declaration of James Obergefell, *Obergefell v. Kasich*, No. 1:13-cv-501 (S.D. Ohio July 22, 2013) 31, 32

Final Vote Results for Roll Call 378, U.S. House of Representatives (July 18, 2006), http://tinyurl.com/obergefell05 12

Cited Authorities

Page

Gary J. Gates, The Williams Institute, UCLA School of Law, *LGBT Parenting in the United States* (Feb. 2013).....4, 35

Gay and Lesbian Rights, Gallup, http://tinyurl.com/obergefell02.....9

Jeff Guo, *That Anti-Gay Bill in Arkansas Actually Became Law Today. Why Couldn't Activists Stop It?*, Wash. Post, Feb. 23, 2015, http://tinyurl.com/obergefell01.....8

H.J. Res. 51, 113th Cong. (2013).....12

H.R. 824, 114th Cong. (2015).....11

H.R. 2523, 113th Cong. (2013).....11

H.R. 3829, 113th Cong. (2014).....11

H.R. 5326, 112th Cong. § 561 (2011).....10

H.R. 8269, 95th Cong. (1977).....9

H.R. Res. 5, 113th Cong. § 4(a)(1) (2013).....10

H.R.J. Res. 88, 109th Cong. (2006).....12

Don J. Jansen, Cong. Research Serv., RL33537, *Military Medical Care: Questions and Answers* (2009).....19

Page

Carolyn Lochhead, *Federal Ban on Same-Sex Marriage Still Casts Shadow on Many Lives*, S.F. Chron., Jan. 12, 2015, http://tinyurl.com/obergefell13 24

Maps of State Laws & Policies, Human Rights Campaign, http://tinyurl.com/obergefell03 10

Marriage Rulings in the Courts, Freedom to Marry (updated Mar. 2, 2015), http://tinyurl.com/obergefell07-1 14

Memorandum from the Att'y Gen. to the President, Implementation of *United States v. Windsor* (June 20, 2014), *available at* http://tinyurl.com/obergefell04 .....11, 18, 22

Memorandum from the Under Sec'y of Def. to Secretaries of the Military Dep'ts and Chiefs of the Military Servs., Further Guidance on Extending Benefits to Same-Sex Spouses of Military Members (Aug. 13, 2013), *available at* http://tinyurl.com/obergefell17 33

Petition for Review, *Am. Military Partner Ass'n v. McDonald*, No. 14-7121(Fed. Cir. Aug. 21, 2014), ECF No. 1 23

Press Release, Ctrs. for Medicare & Medicaid Servs., Medicare Steps Up Enforcement of Equal Visitation and Representation Rights in Hospitals (Sept. 8, 2011), *available at* http://tinyurl.com/obergefell18 34

Page

Press Release, Lambda Legal, Lambda Legal Sues Social Security Administration on Behalf of Texas Lesbian Widow and National Committee to Preserve Social Security & Medicare (Oct. 22, 2014), *available at* http://tinyurl.com/obergefell10 19

Press Release, Soc. Sec. Admin., Social Security Basic Facts (Apr. 2, 2014), *available at* http://tinyurl.com/obergefell09 16

Road Trip: The Blues Highway, Tennessee and Mississippi, Nat'l Geographic, http://tinyurl.com/obergefell20 34

Roll Call Votes 109th Cong., U.S. Senate (June 7, 2006), http://tinyurl.com/obergefell06 12

S. 435, 114th Cong. (2015) 11

S. 1236, 113th Cong. (2013) 11

S. 2024, 113th Cong. (2014) 11

S. Rep. No. 93-235 (1973) 19

S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) ... 8

S.J. Res. 1, 109th Cong. (2006) 12

Cited Authorities

Page

Same-Sex Marriage State-by-State, Pew Research Center (Feb. 9, 2015), http://tinyurl.com/obergefell15 30

Paula Span, *Spouses Denied Social Security Survivors' Benefits*, N.Y. Times, Nov. 11, 2014, http://tinyurl.com/obergefell11 19

Transcript of Oral Argument, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) 8, 17

U.S. Census Bureau, *American Community Survey: Characteristics of Same-Sex Couple Households* (2013), http://tinyurl.com/obergefell14 ..... 2, 30

U.S. Gov't Accountability Office, GAO/OGC-97-16, Defense of Marriage Act, Enclosure I (1997) 25

What Is ALS?, ALS Association, http://tinyurl.com/obergefell16 31

INTEREST OF THE *AMICI CURIAE*[1]

Amici are 167 Members of the U.S. House of Representatives and 44 U.S. Senators.[2] Through Social Security and other federal programs, we partner with States to safeguard families, and we routinely rely upon state decisions about marriage to determine who qualifies for or is subject to more than a thousand federal responsibilities and rights. We therefore have a strong interest in ensuring that state definitions comply with constitutional guarantees and do not wrongfully discriminate against classes of citizens.

Members of Congress and our state counterparts must afford all persons the basic protections of our Constitution. This Court's interpretation of the Fourteenth Amendment's equal protection and due process guarantees directly affects how legislators draft, consider, and enact laws. While we believe that heightened review is warranted for laws that distinguish among individuals based on sexual orientation, we also wish to explain that, regardless of the standard applied, the refusal to license or recognize the marriages of same-sex couples is unconstitutional.

---

1. *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

2. A list of the Members of Congress participating as *amici* appears in an appendix to this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In thirty-seven States and the District of Columbia, gay and lesbian couples can marry. Over 250,000 such couples—representing more than half a million people—have done so.[3] Many *amici* hail from these States; others come from States that have yet to include same-sex couples in their marriage laws. Regardless of where we come from in this nation, we all recognize the importance of the federal-state partnership in safeguarding American families.

This partnership is strongest when families are not wrongly excluded from the vast array of marriage-based rights and responsibilities. That is why many of us argued against the Defense of Marriage Act (DOMA) as *amici* in *United States v. Windsor* and why we participate as *amici* here.

As many of us stated in *Windsor*, heightened judicial scrutiny is appropriate for laws that distinguish among our citizens based on sexual orientation. We offer our unique perspective on why gay men and lesbians lack the meaningful political power that the Sixth Circuit indicated justifies denial of heightened review, and we urge the Court to clarify that the presumption of validity appropriately afforded to most legislation does not apply to laws that discriminate based on sexual orientation.

---

3. *See* U.S. Census Bureau, *American Community Survey: Characteristics of Same-Sex Couple Households* tbl.2 (2013), http://tinyurl.com/obergefell14.

But no matter the standard applied, the state bans are unconstitutional and impair federal interests and the interests of our constituents. Nearly all of the state bans on marriages of same-sex couples were enacted between 1998 and 2012—during the same political environment that led to Congress's enactment in 1996 of DOMA, a law that the Court already has held had the "principal purpose [of] impos[ing] inequality." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013); *see also id.* at 2693 (describing "[t]he history of DOMA's enactment and its own text").

The Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). As the Court concluded with respect to DOMA, state bans on marriages of same-sex couples fail this basic test. Like DOMA, these state bans apply across the board. They limit marriage rights and the right to remain married when crossing state lines. They impose countless burdens and indignities on an identifiable and disfavored class—gay and lesbian couples and their children. And they serve no legitimate governmental objective.

More than 1,000 federal statutes operate in a way that depends on marital status. *See Windsor*, 133 S. Ct. at 2690. By refusing to marry same-sex couples, States can prevent couples and their children from qualifying for federal programs intended to protect and support families and federal officers. For couples lawfully married elsewhere, a State's refusal to recognize the marriage can similarly jeopardize that family's eligibility for federal programs.

These bans impair family stability and mobility and harm children, an estimated 220,000 of whom are being raised by same-sex couples.[4] *See Windsor*, 133 S. Ct. at 2694. While Respondents argue that the state bans somehow encourage family stability, denying same-sex couples and their children the vast array of rights and responsibilities that flow from marriage under state and federal law has the opposite effect.

As federal legislators who represent families across this nation, we believe that—like DOMA—state marriage bans deny our citizens the equal protection that the Constitution guarantees. We urge the Court to make the Constitution's promise of equality a reality for gay and lesbian couples throughout the nation and reverse the judgments below.

ARGUMENT

I. The Constitution Applies with Equal Force to State Regulation of Marriage.

As legislators, we must legislate within constitutional bounds, a duty that applies to Members of Congress and state legislators alike. U.S. Const. art. VI, cl. 3. We do have different legislative spheres. Congressional powers are enumerated in the Constitution, whereas state legislative powers generally are not. *See United States v. Morrison*, 529 U.S. 598, 607 (2000). But the exercise of

---

4. *See* Gary J. Gates, The Williams Institute, UCLA School of Law, *LGBT Parenting in the United States* 1 (Feb. 2013) (estimating more than 125,000 same-sex couples are raising nearly 220,000 children).

legislative power by the States and Congress is subject to constitutional constraints. *See, e.g.*, *Windsor*, 133 S. Ct. at 2681; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

The Court has long recognized that state laws that infringe on fundamental rights or make invidious distinctions are subject to constitutional restraints. This is so even when those laws regulate areas within traditional state authority, such as state courts,[5] property,[6] crime and criminal procedure,[7] and education.[8]

The same is true for marriage. The Court's jurisprudence has been crystal clear since *Loving* that invidious discrimination by States in the area of marriage is unconstitutional.[9] Indeed, applying constitutional protections like the Equal Protection Clause in areas where the States enjoy primary or exclusive legislative responsibility is all the more important, because the Constitution may be the only effective means of redress. *See Brown*, 347 U.S. 483; *cf. Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918).

---

5. *See, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994).

6. *See, e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455, 459–60 (1981).

7. *See, e.g.*, *Arizona v. Gant*, 556 U.S. 332 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

8. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *United States v. Virginia*, 518 U.S. 515, 533–34 (1996).

9. *See, e.g.*, *Loving*, 388 U.S. at 11.

Nothing in this Court's decisions—certainly not *Windsor*—suggests a State may employ otherwise-invidious discrimination simply because the discrimination occurs in family law. The Court's opinion in *Windsor* was clear: "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons."[10]

In *Windsor*, the Court invoked Congress's "unusual deviation" from its historical role of deferring to state marriage determinations as "strong evidence" that the *federal* DOMA was "a law having the purpose and effect of disapproval of" married same-sex couples, not as an indicator that *States* are permitted to deny equal protection in marriage.[11] In fact, the Court has invoked the Equal Protection Clause to invalidate local, state, and federal laws alike.[12]

Laws discriminating based on sexual orientation should not be entitled to the deference that ordinarily applies to legislative enactments. As we explain further below, we are uniquely attuned to the need for heightened scrutiny here.

---

10. *Windsor*, 133 S. Ct. at 2691.

11. *Id.* at 2693.

12. *See, e.g.*, *Lawrence*, 539 U.S. 558; *Romer v. Evans*, 517 U.S. 620, 635 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

II. State Marriage Bans Should Be Subject to Heightened Scrutiny.

As demonstrated in the *amicus* brief submitted by many of us in *Windsor*, laws that discriminate based on sexual orientation must be reviewed with heightened scrutiny under the Equal Protection Clause.[13]

Most legislative enactments are presumptively valid, which we fully understand and appreciate. But this Court's decisions from *Romer* to *Lawrence* to *Windsor* show that this presumption does not accurately capture the Court's approach to laws that classify based on sexual orientation. As the Ninth Circuit has explained:

> *Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

SmithKline Beecham, 740 F.3d at 481.

---

13. *See* Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as *Amici Curiae* in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits at 4–12, *Windsor*, 133 S. Ct. 2675 (No. 12-307) ("*Windsor* Amicus"), *available at* http://tinyurl.com/obergefell00; *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675; *cf. Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014).

When asked to identify an instance "outside of the marriage context" where there would be a "rational basis, reason, for a State using sexual orientation as a factor in denying homosexuals benefits or imposing burdens on them," the petitioners' counsel in *Hollingsworth v. Perry* answered: "Your honor, I cannot. I do not have anything to offer you in that regard."[14] We believe that such a distinction is equally illegitimate within the marriage context. This is the essence of why heightened scrutiny is required. *See Cleburne*, 473 U.S. at 440 (classifications triggering heightened scrutiny "are so seldom relevant to the achievement of any legitimate state interest . . . ."); *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973).

As many of us explained as *amici* in *Windsor*, heightened scrutiny is particularly appropriate because gay men and lesbians lack the political power to safeguard their rights through the legislative process.[15] To the extent that the political strength of gay men and lesbians "has improved markedly in recent years" in some places, as it did for women a generation ago, *see Frontiero*, 411 U.S. at 685, this is a welcome and long-overdue development. But this progress has not been universal. For example, some States continue to enact measures purporting to block local efforts to protect this group.[16] "The question is not

---

14. Transcript of Oral Argument at 14, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

15. *See Windsor* Amicus, *supra* note 13, at 4–12.

16. *See, e.g.*, S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (prohibiting local governments from adopting non-discrimination policies protecting more than what state law protects); Jeff Guo, *That Anti-Gay Bill in Arkansas Actually Became Law Today. Why Couldn't Activists Stop It?*, Wash. Post, Feb. 23, 2015, http://tinyurl.com/obergefell01.

whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Windsor*, 699 F.3d at 184. The unfortunate answer to this question remains "no."

As legislators, we have worked for years to enact bills that would extend basic protections against discrimination to lesbian, gay, bisexual, and transgender Americans. Despite the fact that a vast majority of Americans support these measures, they have not been enacted.[17] Since the 1970s, Members have introduced without success bills to amend the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination based on sexual orientation. *See, e.g.*, H.R. 8269, 95th Cong. (1977).

A more targeted measure designed to ensure workplace protections—the Employment Non-Discrimination Act (ENDA)—has been introduced in every Congress but one since 1994. The bill passed the Senate last Congress, but the House did not bring it up for a vote—even though up to 89 percent of Americans supported such protections in 2008.[18] Thus, there still is no federal statute to protect

---

17. The Sixth Circuit suggests that the repeal of "Don't Ask Don't Tell" shows that gay men and lesbians are an "eminently successful, interest group[]" that needs no protection from the courts. *DeBoer v. Snyder*, 772 F.3d 388, 415 (6th Cir. 2014). But, as many of us explained in *Windsor*, "[e]limination of a costly, discriminatory policy that resulted in the discharge of valuable servicemembers during wartime hardly illustrates political power." *Windsor* Amicus, *supra* note 13, at 11. Indeed, congressional action occurred "only after two federal courts had already declared [Don't Ask, Don't Tell] unconstitutional." *Id.*

18. *See, e.g.*, *Gay and Lesbian Rights*, Gallup, http://tinyurl.com/obergefell02 (last visited Mar. 5, 2015).

LGBT employees from workplace discrimination. The majority of States have no such law either,[19] leaving these employees at risk of discrimination.[20]

While legislatures often have proven unwilling to protect gay and lesbian Americans, the courts have done so. In 1996, Congress enacted DOMA, which prevented same-sex married couples from having their marriages recognized under over 1,100 federal laws and countless other regulations. In subsequent years, the House acted repeatedly to reaffirm DOMA[21] and to authorize the defense of DOMA in court.[22] Just *two years ago*, the House majority leadership urged the Court to uphold DOMA as rationally related to purported interests advanced by the States here, such as "providing a stable structure to raise unintended and unplanned offspring"; "encouraging the rearing of children by their biological parents"; and

---

19. *See Maps of State Laws & Policies*, Human Rights Campaign, http://tinyurl.com/obergefell03 (last visited Mar. 5, 2015).

20. *See, e.g.*, *Bostick v. CBOCS, Inc.*, No. 8:13-cv-1319-T-30TGW, 2014 WL 3809169, at *4 (M.D. Fla. Aug. 1, 2014) ("[C]laims of harassment and retaliation premised on an employee's sexual orientation are not cognizable under Title VII and the [Florida Civil Rights Act]"); *see also Howe v. Haslam*, No. N2013-01790-COA-R3-CV, 2014 WL 5698877, at *18 (Tenn. Ct. App. Nov. 4, 2014); *Inskeep v. W. Reserve Transit Auth.*, No. 12 MA 72, 2013 WL 979054, at *2–3 (Ohio Ct. App. Mar. 8, 2013).

21. *See, e.g.*, H.R. 5326, 112th Cong. § 561 (2011) (provision adopted on vote of 245–171 as an amendment offered by Rep. Tim Huelskamp (R-Kan.)).

22. *See* H.R. Res. 5, 113th Cong. § 4(a)(1) (2013).

"promoting childrearing by both a mother and a father."[23] Many of us argued against these claims, and the Court rejected them—finding that DOMA was enacted "for no legitimate purpose." *Windsor*, 133 S. Ct. at 2696.

Since *Windsor*, some Members have attempted to deprive same-sex couples of federal protections. Sixty-nine House Members and eleven Senators co-sponsored bills to strip federal protections from legally married, same-sex couples domiciled in States that do not recognize their marriages. *See* State Marriage Defense Act, H.R. 3829, 113th Cong. (2014); S. 2024, 113th Cong. (2014); *see also* H.R. 824, 114th Cong. (2015); S. 435, 114th Cong. (2015). These bills would reverse the "longstanding policies" of federal agencies that look to the place of celebration when determining marital status for federal purposes.[24] *Cf. Windsor*, 133 S. Ct. at 2693.

Some Members have also tried to amend the Constitution to prohibit the marriages of same-sex couples—abrogating the actions of voters, legislatures, and state and federal courts that have recognized that these couples should not be excluded from civil marriage.

---

23. *See* Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of The U.S. House of Representatives at 30–32, 44–49, *Windsor*, 133 S. Ct. 2675 (No. 12-307) ("*Windsor* BLAG Brief").

24. *See* Memorandum from the Att'y Gen. to the President, Implementation of *United States v. Windsor* 2 (June 20, 2014), *available at* http://tinyurl.com/obergefell04 ("Attorney General Memorandum"). Bills to repeal DOMA, which the Court already has found was enacted for an improper purpose and with unconstitutional effects, still have not achieved majority support in the House or Senate. *See* S. 1236, 113th Cong. (2013); H.R. 2523, 113th Cong. (2013).

Fifty-nine House Members co-sponsored a constitutional amendment defining "Marriage in the United States" as "consist[ing] only of the union of a man and a woman" and prohibiting the interpretation of the federal or state constitutions to provide a right to marry for same-sex couples. *See* H.J. Res. 51, 113th Cong. (2013). A similar amendment garnered a 236-vote majority in the House in 2006, *see* H.J. Res. 88, 109th Cong. (2006),[25] and the Senate failed to invoke cloture on the motion to proceed by a vote of 49–48. *See* S.J. Res. 1, 109th Cong. (2006).[26] These efforts to eliminate marriages, along with Congress's inability to enact protections for gay men and lesbians, are indicative of this group's relative inability to secure protections legislatively.

We urge the Court to confirm what is clear from *Romer* through *Windsor*: sexual orientation is not a presumptively valid ground for state or federal authorities to classify citizens. Heightened scrutiny is the appropriate standard.

III. No Matter the Standard, State Marriage Bans Violate the Equal Protection Clause and Impair Federal Interests.

As federal legislators, we believe the state bans at issue violate the Equal Protection Clause, impair national interests, and impose significant pecuniary and dignitary harm on same-sex couples and their children throughout the nation.

---

25. *See Final Vote Results for Roll Call 378*, U.S. House of Representatives (July 18, 2006), http://tinyurl.com/obergefell05.

26. *See Roll Call Votes 109th Cong.*, U.S. Senate (June 7, 2006), http://tinyurl.com/obergefell06.

A. State Marriage Bans Deny Equal Protection.

The Constitution "neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632.

As the Court concluded with respect to DOMA, the state marriage bans fail this basic test. The bans apply across the board, limiting couples' marriage rights and even the right to remain married when crossing state lines.[27] They impose countless burdens and indignities on an identifiable and disfavored class—gay and lesbian couples, and their children.[28] And they serve no legitimate governmental objective.[29]

---

27. *See, e.g.*, *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014) ("Idaho and Nevada's marriage laws, by preventing same-sex couples from marrying and refusing to recognize same-sex marriages celebrated elsewhere, impose profound legal, financial, social and psychic harms on numerous citizens of those states."); *cf. Windsor*, 699 F.3d at 186.

28. *See, e.g.*, *Baskin*, 766 F.3d at 658 ("The harm to homosexuals (and, as we'll emphasize, to their adopted children) of being denied the right to marry is considerable. Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status.").

29. *See, e.g.*, *id.* at 656; *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 994–95 (S.D. Ohio 2013) ("The only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married."), *rev'd sub nom. DeBoer*, 772 F.3d 388.

Though more Americans are coming to understand that the love and commitment of same-sex couples should be accorded equal dignity under the law, there are some with deep and abiding convictions to the contrary. Nevertheless, this Court in *Lawrence* made clear that "[t]hese considerations do not answer the question before" the Court. 539 U.S. at 571. Opposition to a particular group is not a valid basis for legislation—certainly not for enacting "a classification of persons undertaken for its own sake" and "den[ying] them protection across the board." *Romer*, 517 U.S. at 633, 635; *see also Lawrence*, 539 U.S. at 571.

We agree with the dozens of federal and state court decisions concluding that state bans on marriages of same-sex couples are unconstitutional.[30]

B. Like DOMA, State Marriage Bans Have a Profound Federal Impact on Same-Sex Couples.

We have a strong interest in ensuring that Congress is not coopted into enforcing, enabling, or abiding by state discrimination in connection with the allocation of federal responsibilities and protections.[31] The state bans do exactly that.

---

30. *See Marriage Rulings in the Courts*, Freedom to Marry (updated Mar. 2, 2015) (listing cases), http://tinyurl.com/obergefell07-1.

31. *See, e.g., Dandridge v. Williams*, 397 U.S. 471 (1970) (applying equal protection analysis to state criteria for eligibility under the Aid to Families with Dependent Children program).

More than 1,000 federal statutes operate in a way that depends on marital status. *See Windsor*, 133 S. Ct. at 2683. Those include "laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits." *Id.* at 2694. As the Court knows, federal statutes typically defer to state enactments concerning domestic relations, provided that those enactments are constitutional. *See, e.g., De Sylva v. Ballentine*, 351 U. S. 570, 580–81 (1956).

Thus, if a couple cannot marry because of state law, that couple will be excluded from federal programs intended to protect and support families. *Windsor* enumerated many examples of DOMA's impact that apply equally here to couples prevented from marrying by state bans. Indeed, just as "DOMA touche[d] many aspects of married and family life, from the mundane to the profound," a state ban that prevents a couple from marrying has the same federal effect, *Windsor*, 133 S. Ct. at 2694–95, and imposes significant harms at the state level as well.

C. State Marriage Bans Undermine Federal Programs.

Bans that exclude same-sex couples from civil marriage undermine several federal safeguards for families that advance important national interests.[32] There is no legitimate basis to deny these protections to same-sex couples who wish to marry but are barred from doing so.

---

32. *See Baskin*, 766 F.3d at 658–59 (analyzing harm from denial of federal benefits and finding no "clearly offsetting government interest").

1. Social Security

Social Security is Congress's commitment to provide for elderly and disabled Americans and their families. Congress affirmed couples' legal commitments to live together and sacrifice for each other in marriage by securing and stabilizing their shared lives through periods of difficulty and death.[33]

As the Court explained in *Windsor*, benefits provided under Social Security, particularly those "allowed to families upon the loss of a spouse and parent, . . . are an integral part of family security." *Windsor*, 133 S. Ct. at 2695. For example, the Social Security program provides benefits to the spouse of a disabled worker, spousal retirement benefits, survivor benefits for spouses, and one-time payments to offset funeral costs to surviving spouses.[34] More than 85 percent of elder households in the United States receive Social Security payments, and 35 percent of all beneficiaries receive 90 percent or more of their total income from Social Security.[35] Over one in four twenty-year-olds will suffer a disability before reaching retirement age.[36]

Family stability is thus undermined, rather than

---

33. *See Mathews v. De Castro*, 429 U.S. 181, 185–86 (1976).

34. *See* 42 U.S.C. § 402(b), (c), (e), (f), (i).

35. *See* Admin. on Aging, U.S. Dep't of Health & Human Servs., *A Profile of Older Americans: 2013*, at 1, http://tinyurl.com/obergefell08.

36. *See* Press Release, Soc. Sec. Admin., Social Security Basic Facts (Apr. 2, 2014), *available at* http://tinyurl.com/obergefell09.

supported, by a State's denial of marital status to same-sex couples and any consequent denial of spousal status under Social Security. As many of us stated in *Windsor*, "the purposes of the Social Security program are not served when denial of survivor benefits to a lesbian's or a gay man's surviving spouse leaves the spouse destitute even though both spouses paid into the Social Security system on the same terms as other citizens."[37]

Moreover, the statutory framework makes clear that the program is not about procreation—it is about the security of individuals and families, including during the twilight of their lives. Most Social Security retirement and spousal benefits begin at age 62 or age 65[38]—long after a couple is physically capable of procreation.[39] Congress has even extended benefits to the *divorced* spouse of a retiree or worker facing a disability—provided the marriage lasted for ten years.[40] Securing the financial benefits and security stemming from the family relationship, even after a marriage is over or unlikely to produce children, is the primary purpose of Social Security (as the program's name implies).

---

37. *Windsor* Amicus, *supra* note 13, at 18.

38. *See* 42 U.S.C. § 402.

39. *See* Transcript of Oral Argument at 25, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) (statement of Kagan, J.) ("I can just assure you, if both the woman and the man are over the age of 55, there are not a lot of children coming out of that marriage."); *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) ("Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.").

40. *See* 42 U.S.C. § 416(d)(1), (2), (4), (5).

Yet even today, on the basis of state bans, the Social Security Administration continues to deny federal benefits to same-sex couples who are legally married.[41] In particular, the Social Security Administration processes "surviving spouses' claims and appeals involving same-sex couples, including Medicare-only claims, when the individual who paid into Social Security was domiciled at the time of his or her death in a state that recognized his or her marriage."[42] A core federal benefit thus may be denied to a surviving spouse at the time of greatest need because a State forbade that couple from marrying or deemed that couple's marriage unworthy of recognition.

This scenario is not hypothetical. It is a real-life situation that has unfolded for families across our nation since *Windsor*. For example:

> [f]or more than 30 years, Texas residents Kathy Murphy, 62, and Sara Barker shared their lives together. Three decades after they first met, Kathy and Sara legally married in Massachusetts in 2010. Like other married couples, they hoped to grow old together and to live out their retirement years in safety, security, and dignity.
>
> Tragically, Sara lost her battle with cancer in March 2012 at age 62, leaving Kathy a widow. Because the couple lived in Texas, which refuses to recognize their marriage, SSA also won't recognize the marriage, denying Kathy spousal

41. *See* Attorney General Memorandum, *supra* note 24, at 13.

42. *Id.*

survivor's benefits earned by Sara over a lifetime of work.[43]

The state bans fundamentally interfere with Social Security, a bedrock protection for the elderly and those with disabilities. This indignity is reinforced each month—when the couple or surviving spouse receives lesser or no benefits because of a state ban.

2. Military and Veterans' Benefits

Our nation also has a system of military and veterans' benefits that provides substantial support and care to servicemembers and veterans, to whom we owe a great debt. A strong system to provide for veterans is critical to ensuring that those fighting overseas can focus on the fight without concern for the security of their families at home. "No soldier can be and remain at his best with the constant realization that his family and loved ones are in dire need of financial assistance."[44]

---

43. Press Release, Lambda Legal, Lambda Legal Sues Social Security Administration on Behalf of Texas Lesbian Widow and National Committee to Preserve Social Security & Medicare (Oct. 22, 2014), *available at* http://tinyurl.com/obergefell10; *see also* Paula Span, *Spouses Denied Social Security Survivors' Benefits*, N.Y. Times, Nov. 11, 2014, http://tinyurl.com/obergefell11; Associated Press, *LGBT Baby Boomers Face Tough Retirement Hurdles*, Dec. 2, 2014.

44. S. Rep. No. 93-235, at 7 (1973); *see also* 127 Cong. Rec. 21,378 (1981) (statement of Sen. Dennis DeConcini) ("Long-range benefits which insure the future financial security of both partners in a military marriage will improve morale and increase reenlistment."); Don J. Jansen, Cong. Research Serv., RL33537, *Military Medical Care: Questions and Answers* 2 (2009) ("[R]ecruitment and retention are supported by the provision of

Benefits accrue to same-sex couples under Title 10 (for active-duty servicemembers), Title 32 (for the National Guard), and Title 38 (for veterans). A large number of these benefits are vital to military readiness. Examples include:

- Retirement benefits;[45]
- Disability benefits;[46]
- Survivorship and death benefits;[47]
- The VA home loan program;[48]
- VA education benefits (*i.e.*, GI Bill);[49]

---

health benefits to military retirees and their dependents.").

45. *See, e.g.*, 10 U.S.C. §§ 1448, 1450(a) (providing for annuities to spouses of deceased servicemembers entitled to retirement benefits).

46. *See* 38 U.S.C. §§ 1115, 1135 (providing increased compensation to disabled veterans with dependents, including spouses).

47. *See, e.g.*, 32 U.S.C. § 714, 38 U.S.C. §§ 1311, 1541, 5121, 5121A (providing survivor compensation to spouses of veterans of wartime and peacetime, along with other benefits).

48. *See* 38 U.S.C. § 3710 (automatically guaranteeing home loans to veterans and covering some surviving spouses).

49. *See, e.g.*, 38 U.S.C. § 3311(b)(9) (giving post-9/11 GI Bill benefits to spouses of servicemembers who die in the line of duty); *id.* § 3501(a)(1) (defining educational benefits for "eligible persons" to include spouses of disabled servicemembers or those who died from service-related disabilities).

- Family separation benefits;[50]

- Housing and cost-of-living allowances;[51]

- Supplemental subsistence allowances for low-income servicemember households;[52]

- Healthcare in armed forces facilities,[53] including access to TRICARE, which is "the health care program for uniformed servicemembers (active, Guard/Reserve, retired) and their families around the world";[54]

- Civil protections in financial and procedural areas like default judgments, taxes, and voting rights;[55] and

---

50. *See* 37 U.S.C. § 427 (providing monthly allowance when servicemembers are separated from their families).

51. *See, e.g.*, 37 U.S.C. §§ 403 (amended 2014), 403b (providing monthly allowances).

52. *See* 37 U.S.C. § 402a (providing additional allowances if servicemember's household income falls within eligibility for federal nutrition assistance programs).

53. *See, e.g.*, 10 U.S.C. §§ 1072(2), 1076, 1077, 1097a, 38 U.S.C. § 1781 (providing for dependent access to military healthcare).

54. *About Us*, TRICARE, http://tinyurl.com/obergefell12-1 (last visited Mar. 5, 2015).

55. Servicemembers Civil Relief Act, 50 App. U.S.C. § 538 (applying servicemember protections to dependents, including spouses, if "materially affected by reason of the servicemember's military service").

• The right to be buried together in veterans' cemeteries.[56]

The Court's opinion in *Windsor* singled out veterans' benefits as one facet of benefits denied by DOMA. 133 S. Ct. at 2694. A state law that prevents military couples from marrying can produce the same denial of benefits, leaving some veterans on unequal footing as compared with those who served alongside them.

Even after *Windsor*, the Department of Veterans Affairs continues to deny benefits to legally married, same-sex couples. The Justice Department has said:

> [the] VA will recognize for purpose of applicable benefits those same-sex marriages that are recognized by the law of the place of residence of either spouse at the time of the marriage, or by the law of the place of residence of either spouse at the time the claimant became eligible for benefits.[57]

Thus, a veteran stationed in a non-recognition State at the time he or she married may be denied veterans' benefits or have such benefits reduced. As the American Military Partner Association (AMPA) has explained, "the VA will deny spousal benefits to AMPA member veterans and same-sex spouses who married in Maryland but at the

---

56. *See, e.g.*, Windsor, 133 S. Ct. at 2694 (noting that DOMA "prohibits [married same-sex couples] from being buried together in veterans' cemeteries.").

57. Attorney General Memorandum, *supra* note 24, at 8; *see also* 38 U.S.C. § 103(c).

time of their marriage and application for spousal benefits resided in Virginia—even though Virginia's marriage ban has been held unconstitutional by the Fourth Circuit."[58]

These concerns are real for many veterans, who put themselves in harm's way and yet still face discrimination at home. For example:

> [f]or Steven Rains, the Defense of Marriage Act is very much alive.
>
> In 2008, Rains and his partner, Donald Condit, drove from Fort Worth, Texas, to the Riverside County town of Hemet, where Condit's parents lived, to marry during the brief window when California allowed same-sex marriages before voters banned them again under Proposition 8. A federal court overturned that ban in 2010, although it wasn't until 2013 that the marriages resumed.
>
> "We got in the car and drove," Rains said. "We didn't even want to wait a couple of weeks for a decent airline ticket."
>
> In 2013, Condit, after retiring from a railroad career, died from the drugs used to treat his exposure to Agent Orange in Vietnam. As his widower, Rains, now 60, could have been entitled to federal railroad retiree and veterans' survivor benefits. But both have been denied

58. Petition for Review at 8, *Am. Military Partner Ass'n v. McDonald*, No. 14-7121 (Fed. Cir. Aug. 21, 2014), ECF No. 1.

because at the time of Condit's death, the couple lived in Texas, which bans gay and lesbian marriages.[59]

3. Domestic Support Obligations

Another federal protection States deny to same-sex couples by barring their marriages is "the Bankruptcy Code's special protections for domestic-support obligations," which the Court also highlighted in *Windsor*. 133 S. Ct. at 2694.

When two individuals marry, a subsequent divorce may result in a domestic support obligation. If the spouse that owes the obligation later declares bankruptcy, the obligation is at risk of being diluted or extinguished. The Bankruptcy Code protects against this risk by ensuring that domestic support obligations receive priority over other creditors' claims and are not discharged.[60] These "special protections" are premised on the idea that spouses' contributions to each other's wellbeing are a foundation of security for spouses and their children—including after a marital relationship ends. The need for this security is especially acute where one partner supports the other in non-financial ways and, at a parting of the ways, finds himself lacking an established career or education.

---

59. Carolyn Lochhead, *Federal Ban on Same-Sex Marriage Still Casts Shadow on Many Lives*, S.F. Chron., Jan. 12, 2015, http://tinyurl.com/obergefell13.

60. *See* 11 U.S.C. § 101(14A); *id.* § 507(a)(1); *id.* § 523(a)(5), (a)(15).

A State's marriage ban can prevent such a domestic support obligation from ever coming into existence,[61] impairing a key source of family security in the event of bankruptcy.

4. Federal Employee Protections

The state bans likewise frustrate federal interests in protecting federal employees, including law enforcement agents and prosecutors, and their families.

As many of us explained in *Windsor*, "[t]he Federal Employee Compensation Act acknowledges the financial interdependence of spouses regardless of the presence of children, and it provides spousal survivor benefits if a federal employee is killed on the job."[62] Numerous other benefits flow from federal employment, such as health insurance provided for an employee's spouse.[63] The state bans frustrate the congressional goal behind

---

61. *See, e.g.*, *Borman v. Pyles-Borman*, No. 2014CV36, 2014 WL 4251133 (Tenn. Cir. Ct. Aug. 5, 2014) (denying same-sex married couple a divorce under Tennessee's non-recognition law).

62. *Windsor* Amicus, *supra* note 13, at 26 (citing 5 U.S.C. §§ 8101 *et seq.*).

63. *See* 5 U.S.C. §§ 8901(5), 8905 (allowing federal employees to enroll in health benefits plans covering self, spouse, and children); *In re Golinski*, 587 F.3d 901, 902 (9th Cir. 2009) (describing provision of Federal Employees Health Benefits Act covering employees' families, including spouses); *see also, e.g.*, 5 U.S.C. §§ 9001, 9002 (providing long-term care insurance to spouses of employees); *see also* U.S. Gov't Accountability Office, GAO/OGC-97-16, Defense of Marriage Act, Enclosure I 4 (1997) (describing how "[m]arital status is a factor . . . in many ways" in laws concerning federal employee benefits).

these benefits: to ensure a productive and stable federal workforce.

Beyond those employee protections, Congress has acted to protect federal officials and their families from retaliation or intimidation. Federal law criminalizes the threat or commission of violent offenses against federal officials, judges, and law enforcement officers—and their families, including spouses—with the intent to impede or retaliate against the official.[64]

The federal interest in this statute is clear: to guard against interference with federal judges, agents, and prosecutors. As the Court has said:

> It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.[65]

Protections against, and punishment for, individuals who coerce or retaliate against federal officials and their families are integral to a well-functioning government.

The state bans impair these protections for federal officials. A gay or lesbian FBI agent, federal prosecutor, or federal judge may have far less protection for his or

---

64. *See* 18 U.S.C. § 115.

65. *In re Neagle*, 135 U.S. 1, 59 (1890) (concerning federal official protecting a Supreme Court Justice).

her family than would otherwise attach. These officials may investigate, prosecute, or preside over some of the most dangerous individuals, including terrorists, drug kingpins, members of organized crime syndicates, gang members, and human traffickers. Because of the state bans, such important work may expose a gay or lesbian federal official to a greater chance of violence, a harm this Court said was "even more serious" than other inequalities imposed by DOMA. *Windsor*, 133 S. Ct. at 2694–95.

IV. States' Refusals to Respect Lawful Marriages Place Our Constituents at Risk.

Windsor recognizes that the marital relationship, once created, confers "a dignity and status of immense import" that cannot be lightly ignored. 133 S. Ct. at 2692.[66] Yet, because of the state bans, crossing a state line creates enormous risk for a married same-sex couple and their children. Easily done by other families without a second thought, such a simple act could have severe consequences for these couples and inflict harm on their children, for no legitimate purpose.

A. Like DOMA, States that Refuse to Recognize Valid Marriages Deny Equal Protection.

Like DOMA, state bans on recognizing marriages performed elsewhere have the "principal effect" of "identify[ing] a subset of state-sanctioned marriages and mak[ing] them unequal." *Windsor*, 133 S. Ct. at 2694. Such bans create two tiers of out-of-state marriages. One

66. *See also Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring in the judgment).

class is recognized as a matter of course,[67] and a second class is denied recognition because it consists of the marriages of same-sex couples—the same class denied federal recognition under DOMA.

Indeed, the bans at issue come from States that commonly validate out-of-state marriages—as long as the couple is opposite-sex—even where the marriage could not validly occur under that State's law and was purposely celebrated out of state to evade the State's marriage prohibition.[68] By departing from the longstanding "place-of-celebration" marriage recognition rule applied to opposite-sex couples,[69] these bans, like DOMA, are "discriminations of an unusual character [that] especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633).

As in *Windsor*, "no legitimate purpose overcomes the purpose and effect to disparage and to injure those

---

67. "The general rule in the United States for interstate marriage recognition is the 'place of celebration' rule, which provides that marriages valid where celebrated are valid everywhere." *Henry v. Himes*, 14 F. Supp. 3d 1036, 1040 (S.D. Ohio 2014), *rev'd sub nom. DeBoer*, 772 F.3d 388. This means, for example, that a State like Ohio will recognize all out-of-state marriages other than those of same-sex couples. *See Obergefell*, 962 F. Supp. 2d at 973.

68. Such "evasive" marriages have routinely been granted interstate respect. *See, e.g., In re Miller's Estate*, 214 N.W. 428 (Mich. 1927); *Mazzolini v. Mazzolini*, 155 N.E.2d 206 (Ohio 1958); *Keith v. Pack*, 187 S.W.2d 618 (Tenn. 1945).

69. *See supra* note 67.

whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696.[70] The Court rejected a claimed link between excluding gay and lesbian married couples from federal benefits and the asserted goal of "address[ing] the tendency of opposite-sex relationships to produce unintended and unplanned offspring."[71] A federal statute penalizing already-married same-sex couples was simply unconnected to that asserted goal.[72] Just so here. "There is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging [] opposite-sex couples to procreate more responsibly." *Perry v. Brown*, 671 F.3d 1052, 1088 (9th Cir. 2012), *vacated sub*

---

70. Section 2 of DOMA, 28 U.S.C. § 1738C, is not challenged here and is irrelevant. States cannot escape examination of their laws by resort to Section 2 because "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Saenz v. Roe*, 526 U.S. 489, 508 (1999); *see also Graham v. Richardson*, 403 U.S. 365, 382 (1971) ("Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."). Moreover, were Section 2 to have any bearing here, the Court has already held that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence." *Windsor*, 133 S. Ct. at 2693. This conclusion applies with equal force to both operative sections of the law.

71. *Windsor* BLAG Brief, *supra* note 23, at 21.

72. *See Windsor*, 699 F.3d at 188 ("Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.").

nom. Hollingsworth, 133 S. Ct. 2652; *see also Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014) (calling such a position "wholly illogical").

B. States that Refuse to Recognize Valid Marriages Deprive Many of Our Constituents of Important Rights Essential to Family Stability.

As of 2013, there were a reported 251,695 married same-sex couples, representing more than half a million individuals, in the United States.[73] This number is likely significantly larger today because many States have since extended the freedom to marry to same-sex couples.[74]

These couples and their children live throughout the nation, in States that include same-sex couples in their marriage laws and those that still do not.[75] Many are, or were, our constituents. Like other families, they move and travel to and through other States for reasons including employment, education, health care, and leisure.

Yet unlike other married couples, they are often stripped of spousal protections when they move and travel. For example, a same-sex couple who married in Maryland will, upon entering Ohio, be treated as legal strangers:

---

73. *See* U.S. Census Bureau, *supra* note 3.

74. Same-sex couples gained the ability to marry in approximately twenty States over the past year alone. *See, e.g.*, *Same-Sex Marriage State-by-State*, Pew Research Center (Feb. 9, 2015), http://tinyurl.com/obergefell15. A number of these States, such as Illinois and Pennsylvania, are some of the most populous States in the nation.

75. *See* U.S. Census Bureau, *supra* note 3, tbl.3.

> Same-sex couples are denied local and state tax benefits available to heterosexual married couples, denied access to entitlement programs (Medicaid, food stamps, welfare benefits, *etc.*) available to heterosexual married couples and their families, barred by hospital staff and/or relatives from their long-time partners' bedsides during serious and final illnesses due to lack of legally-recognized relationship status, denied the remedy of loss of consortium when a spouse is seriously injured through the acts of another, denied the remedy of a wrongful death claim when a spouse is fatally injured through the wrongful acts of another, and evicted from their homes following a spouse's death because same-sex spouses are considered complete strangers to each other in the eyes of the law.

Henry, 14 F. Supp. 3d at 1050.

This discrimination imposes far-reaching disabilities on same-sex married couples reminiscent of those imposed by the state constitutional amendment in *Romer v. Evans*, which singled out gay men and lesbians for disfavored treatment. 517 U.S. at 631, 633. The case of James Obergefell and John Arthur is illustrative. After nearly 20 years together in a loving, committed relationship, Mr. Arthur was diagnosed with ALS,[76] or "Lou Gehrig's Disease."[77] Knowing that Mr. Arthur did not have long

---

76. Declaration of James Obergefell ¶¶ 3, 9, *Obergefell v. Kasich*, No 1:13-cv-501 (S.D. Ohio July 22, 2013).

77. *See What is ALS?*, ALS Association, http://tinyurl.com/obergefell16 (last visited Mar. 5, 2015).

to live, the couple flew on a medically-equipped plane to Maryland, where they were married on the airport tarmac by Mr. Arthur's aunt.[78] As Mr. Obergefell explained, they "want[ed] the world to know that [they] share the highest commitment two people can make to each other in our society."[79]

Marriage was important not only for their sense of dignity, but also for practical reasons. Being married would allow Mr. Obergefell to be listed as the surviving spouse on Mr. Arthur's death certificate, which has important evidentiary value for issues such as receiving life insurance payouts, administering wills, and transferring title for automobiles, real estate, and other property. *See Obergefell*, 962 F. Supp. 2d at 980. Mr. Arthur wished to have Mr. Obergefell buried next to him in his family plot, but the family plot directive limited those who may be interred in the plot to descendants and spouses. *See Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262, at *7 (S.D. Ohio July 22, 2013). As the district court emphasized, "the uncertainty around this issue during Mr. Arthur's final illness is the cause of extreme emotional hardship to the couple. Dying with an incorrect death certificate that prohibits Mr. Arthur from being buried with dignity constitutes irreparable harm." *Id.*

This couple took extraordinary steps to overcome Ohio's marriage ban, made possible only through the loving support of their family and friends.[80] For many

78. Declaration of James Obergefell, *supra* note 76, ¶ 12.

79. *Id.* ¶ 15.

80. *Id.* ¶ 12.

couples, this would have been a financial impossibility. Regardless of whether a couple can travel out of state to marry, their lawful marriage may be denied recognition, as occurred here. Such significant and direct interference with the ability of an entire class of citizens to access the vast array of state and federal rights and responsibilities of civil marriage does not comply with core equal protection guarantees.[81] *Cf. Zablocki*, 434 U.S. 374. "A State cannot so deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 635.

Moreover, even couples who live in States that recognize their marriages face unwarranted jeopardy when they visit or travel through States that do not. For example, should an accident or medical emergency occur during a family trip, one spouse may be obstructed when visiting or making medical care decisions on behalf of the other spouse.[82]

---

81. Since *Windsor*, the federal government has tried to mitigate the hardship and harm caused by state marriage bans by, for example, granting same-sex military personnel non-chargeable leave "for travel to a state or jurisdiction that allows same-sex couples to be married." Memorandum from the Under Sec'y of Def. to Secretaries of the Military Dep'ts and Chiefs of the Military Servs., Further Guidance on Extending Benefits to Same-Sex Spouses of Military Members 1 (Aug. 13, 2013), *available at* http://tinyurl.com/obergefell17. Such efforts demonstrate the burden that these bans impose on couples, their families, and the federal government.

82. *See, e.g., Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326, 1347 (S.D. Fla. 2009) (finding no relief available where hospital denied plaintiff visitation with her same-sex partner and access to partner's medical records). In response to the *Langbehn* case and others, the Department of Health

The legendary "Blues Highway" route,[83] for instance, could take a family through up to four States that do not recognize marriages of same-sex couples (Arkansas, Tennessee, Mississippi, and Louisiana). As a Mississippi district court recognized: "Suppose that . . . Joce becomes [seriously] ill and [the] hospital denies Carla the visiting rights it grants married couples. The emotional damage would be profound and irreparable. The same can be said for . . . every other committed same-sex couple without a State-recognized marriage." *Campaign for S. Equal. v. Bryant*, No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570, at *35 (S.D. Miss. Nov. 25, 2014).

---

and Human Services promulgated regulations and guidelines requiring Medicare and Medicaid participating hospitals to allow patients to designate their visitors and healthcare proxies. *See* 42 C.F.R. §§ 482.13, 485.635; Press Release, Ctrs. for Medicare & Medicaid Servs., Medicare Steps Up Enforcement of Equal Visitation and Representation Rights in Hospitals (Sept. 8, 2011), *available at* http://tinyurl.com/obergefell18. However, in situations where a patient has not made pre-designations and is unable to do so, hospitals can resort to their default visitation policies, which may not be inclusive of gay men and lesbians, and to state laws, which often give spouses, but not same-sex partners, priority to make medical care decisions. *See, e.g.*, Ky. Rev. Stat. Ann. § 311.631(1)(c); Ohio Rev. Code Ann. § 2133.08(B)(2); Tenn. Code Ann. § 68-11-1806(c)(3)(A); *see also* Blake Boldt, *Woman Denied Visitation of Partner at Local Hospital*, Out & About Nashville, Dec. 19, 2011, http://tinyurl.com/obergefell19 (reporting Tennessee woman denied visit with same-sex partner by hospital participating in Medicare and Medicaid).

83. *See Road Trip: The Blues Highway, Tennessee and Mississippi*, Nat'l Geographic, http://tinyurl.com/obergefell20 (last visited Mar. 5, 2015).

C. States that Refuse to Recognize Valid Marriages Divest Many of Our Constituents of the "Dignity and Status of Immense Import" of Marriage.

States' refusals to recognize marriages also cause same-sex couples, and the hundreds of thousands of children of those couples,[84] immeasurable psychological harm by "instruct[ing] all . . . officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Windsor*, 133 S. Ct. at 2696. "The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization." *Tanco v. Haslam*, 7 F. Supp. 3d 759, 770 (M.D. Tenn. 2014), *rev'd sub nom. DeBoer*, 772 F.3d 388.

For example, Dr. Valeria Tanco and Dr. Sophia Jesty married in New York, where they met while studying veterinary medicine. After completing their training, they accepted teaching positions at the University of Tennessee. Upon moving, the couple found their commitment and hard work rewarded with a second-class status infecting major facets of their lives. Because theirs was not an opposite-sex marriage, they faced uncertainties surrounding property protections in their newly purchased home[85]

---

84. *See* Gates, *supra* note 4.

85. Married couples enjoy property protections under Tennessee's laws, including the right to a share of a decedent's estate (Tenn. Code Ann. § 31-2-104); the right to hold real property

and their eligibility for a family health insurance plan. *Id.* at 764. When Dr. Tanco became pregnant, a cause for celebration became a cause for

> concern[] about the environment in which their child [would] be raised, fearing that Tennessee's refusal to recognize her parents' marriage [would] stigmatize her, cause her to believe that she and her family are entitled to less dignity than her peers and their families, and give her the impression that her parents' love and their family unit is somehow less stable.

Id.

Another couple, Matthew Mansell and John Espejo, moved to Tennessee after Mr. Mansell's law firm transferred him from California, where the couple had married and adopted children. *Id.* at 765. In Tennessee they found their marriage a nullity. Like the Tanco-Jesty couple, they were understandably concerned about the impact that would have on their children. *Id.* As the Tennessee district court acknowledged, these couples faced the "imminent risk of potential harm to their children during their developing years from the stigmatization and denigration of their family relationship." *Id.* at 770.

Countless couples will move or travel, if they have not already, to a non-recognizing State and be subject to a law that does not treat them with the same dignity and respect that other married couples receive. Opposite-

---

in a tenancy by the entirety (Tenn. Code Ann. § 66-1-109); and the right to defer some property taxes (Tenn. Code Ann. § 7-64-201).

sex married couples enjoy the security of knowing their marriages will be recognized throughout the country, even in States where they could not affirmatively marry.[86] However, as with DOMA:

> [state bans] tell[] [same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . . And it humiliates tens of thousands of children now being raised by same-sex couples. The [state ban] in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Windsor, 133 S. Ct. at 2694.

No legitimate interest justifies the drastic "deprivation of the liberty of the person" effected by the nullification of already-established marriages, including those of our constituents. *Id.* at 2695.

---

86. *See supra* notes 67–68.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

HEATHER C. SAWYER
House Committee on the Judiciary
Minority Counsel to Ranking Members John Conyers, Jr. and Jerrold Nadler
B-336 Rayburn Bldg.
Washington, DC 20515
(202) 225-6906

JOSEPH F. TRINGALI
Counsel of Record
JOSHUA C. POLSTER
ELISA Y. LEE
AIDAN T. GRANO
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
jtringali@stblaw.com

Counsel for Amici Curiae

March 6, 2015

APPENDIX

APPENDIX

The Members of Congress participating as *amici* are:

United States Senators

Tammy Baldwin
Michael F. Bennet
Richard Blumenthal
Cory Booker
Barbara Boxer
Sherrod Brown
Maria Cantwell
Benjamin L. Cardin
Thomas R. Carper
Robert P. Casey, Jr.
Christopher Coons
Joe Donnelly
Richard J. Durbin
Dianne Feinstein
Al Franken
Kirsten Gillibrand
Martin Heinrich
Heidi Heitkamp
Mazie K. Hirono
Tim Kaine
Angus S. King, Jr.
Amy Klobuchar
Patrick Leahy
Edward J. Markey
Claire McCaskill
Robert Menendez
Jeff Merkley
Barbara A. Mikulski
Christopher S. Murphy
Patty Murray
Bill Nelson
Gary Peters
Jack Reed
Harry Reid
Bernard Sanders
Brian Schatz
Charles E. Schumer
Jeanne Shaheen
Debbie Stabenow
Jon Tester
Mark R. Warner
Elizabeth Warren
Sheldon Whitehouse
Ron Wyden

Appendix

Members of the U.S. House of Representatives

Alma S. Adams
Pete Aguilar
Brad Ashford
Karen Bass
Joyce Beatty
Xavier Becerra
Ami Bera
Donald S. Beyer Jr.
Earl Blumenauer
Suzanne Bonamici
Brendan F. Boyle
Robert A. Brady
Julia Brownley
Cheri Bustos
Lois Capps
Michael E. Capuano
Tony Cárdenas
John C. Carney, Jr.
André Carson
Matt Cartwright
Kathy Castor
Joaquin Castro
Judy Chu
David N. Cicilline
Katherine M. Clark
Yvette D. Clarke
James E. Clyburn
Steve Cohen
Gerald E. Connolly
John Conyers, Jr.
Jim Cooper
Joe Courtney
Joseph Crowley
Elijah E. Cummings
Danny K. Davis
Susan A. Davis
Peter A. DeFazio
Diana DeGette
John K. Delaney
Rosa L. DeLauro
Suzan K. DelBene
Mark DeSaulnier
Theodore E. Deutch
Debbie Dingell
Lloyd Doggett
Michael F. Doyle
Tammy Duckworth
Donna F. Edwards
Keith Ellison
Eliot L. Engel
Anna G. Eshoo
Elizabeth H. Esty
Sam Farr
Chaka Fattah
Bill Foster
Lois Frankel
Marcia L. Fudge
Tulsi Gabbard

Appendix

Members of the U.S. House of Representatives (continued)

Ruben Gallego
John Garamendi
Alan Grayson
Al Green
Raúl M. Grijalva
Luis V. Gutiérrez
Janice Hahn
Alcee L. Hastings
Denny Heck
Brian Higgins
James A. Himes
Michael M. Honda
Steny H. Hoyer
Jared Huffman
Steve Israel
Sheila Jackson Lee
Hakeem S. Jeffries
Henry C. "Hank" Johnson, Jr.
Marcy Kaptur
Robin L. Kelly
Joseph P. Kennedy
Dan Kildee
Derek Kilmer
Ron Kind
Ann Kirkpatrick
Ann McLane Kuster
James R. Langevin
John B. Larson
Brenda L. Lawrence
Barbara Lee
Sander M. Levin
John Lewis
Ted Lieu
Dave Loebsack
Zoe Lofgren
Alan S. Lowenthal
Nita M. Lowey
Ben Ray Luján
Michelle Lujan Grisham
Stephen F. Lynch
Carolyn B. Maloney
Sean Patrick Maloney
Doris O. Matsui
Betty McCollum
Jim McDermott
James P. McGovern
Jerry McNerney
Gregory W. Meeks
Grace Meng
Gwen Moore
Seth Moulton
Patrick E. Murphy
Jerrold Nadler
Grace F. Napolitano
Richard E. Neal
Richard M. Nolan
Donald Norcross
Eleanor Holmes Norton

Appendix

Members of the U.S. House of Representatives (continued)

Beto O'Rourke
Frank Pallone, Jr.
Bill Pascrell, Jr.
Donald M. Payne, Jr.
Nancy Pelosi
Ed Perlmutter
Scott H. Peters
Chellie Pingree
Mark Pocan
Jared Polis
David E. Price
Mike Quigley
Charles B. Rangel
Kathleen M. Rice
Lucille Roybal-Allard
Raul Ruiz
C. A. Dutch Ruppersberger
Bobby L. Rush
Tim Ryan
Linda T. Sánchez
Loretta Sanchez
John P. Sarbanes
Janice D. Schakowsky
Adam B. Schiff
Robert C. "Bobby" Scott
José E. Serrano
Brad Sherman
Kyrsten Sinema
Albio Sires
Louise McIntosh Slaughter
Adam Smith
Jackie Speier
Eric Swalwell
Mark Takai
Mark Takano
Mike Thompson
Dina Titus
Paul Tonko
Norma J. Torres
Niki Tsongas
Chris Van Hollen
Juan Vargas
Marc A. Veasey
Nydia M. Velázquez
Timothy J. Walz
Debbie Wasserman Schultz
Maxine Waters
Bonnie Watson Coleman
Peter Welch
Frederica S. Wilson
John A. Yarmuth
William R. Keating